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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

DERRICK KABANUK,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF
THE STATE OF MINNESOTA

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QUESTION PRESENTED

Whether an accused juvenile, in the context of a state juvenile delinquency prosecution, is denied due process of law by a procedure which permits the determination of guilt to be made by a judge who did not preside at the trial nor hear the testimony, but whose decision is based upon a review of the record of an earlier hearing conducted before a referee?

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THE STATE OF MINNESOTA

Petitioner, Derrick Kabanuk, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Minnesota in this case.

OPINIONS BELOW

The opinion of the Minnesota Court of Appeals is reported at 363 N.W.2d 877 (Minn. App. 1985). The opinion of the

Hennepin County Juvenile Court is not reported.

JURISDICTION

The judgment of the Minnesota Court of Appeals was entered on March 12, 1985.

The Minnesota Supreme Court denied review on May 20, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statute 260.031:

> Subdivision 1. The chief judge

of the judicial district may appoint one or more suitable persons to act as referees. All referees are subject to the administrative authority and assignment power of the chief judge of the district as provided in section 484.69, subdivision 3, and are not limited to assignment to juvenile court. Referees shall hold office at the pleasure of the judges of the district court and shall be learned in the law, except that persons holding the office of referee on January 1, 1983, may continue to serve under the terms and conditions of their appointment. The compensation of a referee shall be fixed by the judge, approved by the county board and payable from the general revenue funds of the county not otherwise appropriated. Part time referees holding office in the second judicial district pursuant to this subdivision shall cease to hold office on July 31, 1984.

Subd. 2. The judge may direct that any case or class of cases shall be heard in the first instance by the referee in the manner provided for the hearing of cases by the court.

Subd. 3. Upon the conclusion of the hearing in each case, the referee shall transmit to the judge all papers relating to the case, together with his findings and recommendations in writing. Notice of the findings of the referee together with a statement relative to the right of rehearing shall be given to the minor, parents, guardian, or custodian of the minor whose case has been heard by the referee, and to any other person that the court may direct. This notice

may be given at the hearing, or by certified mail or other service directed by the court.

Subd. 4. The minor and his parents, guardians, or custodians are entitled to a hearing by the judge of the juvenile court if, within three days after receiving notice of the findings of the referee, they file a request with the court for a hearing. The court may allow such a hearing at any time.

Subd. 5. In case no hearing before the judge is requested, or when the right to a hearing is waived, the findings and recommendations of the referee become the decree of the court when confirmed by an order of the judge. The final order of the court shall, in any event, be proof of such confirmation, and also of the fact that the matter was duly referred to the referee.

Rule 2, Minnesota Rules of Procedure for Juvenile Court:

Rule 2.01. Authorization to Hear Cases

A referee may hear, as authorized by statute, any matter under the jurisdiction of the court in the manner provided for the hearing of matters by the court.

Rule 2.02. Objection to Assignment of Referee

The child's counsel or the county attorney may object to a referee presiding at a hearing. This objection shall

be in writing and filed with the court within three (3) days after being informed that the matter is to be heard by a referee or the right to object is waived. The court may permit the filing of a written objection to a referee at any time. After the filing of an objection, a judge shall hear any motion and preside at any hearing.

Rule 2.03. Transmittal of Findings

Upon the conclusion of a hearing the referee shall transmit to the judge findings and recommendations in writing. Notice of the findings of the referee together with a statement relative to the right to a review before a judge shall be given either orally on the record, or in writing to the child, the child's counsel, the child's parent(s) and guardian, and their counsel, the county attorney and to any other person that the court may direct.

Rule 2.04. Review

Subd. 1. Generally. A matter which has been decided by a referee may be reviewed in whole or in part by a judge.

Subd. 2. Filing. A motion for a review by a judge must be filed with the court within ten (10) days after the referee's findings and recommendations have been provided, pursuant to Rule 10.

Subd. 3. Right of Review upon Filing of Timely Motion.

(A) *Right of a Child.* The child is entitled to a review by a judge in any matter upon which a referee has made findings or recommendations.

(B) *Right of County Attorney.*

The county attorney is entitled to a review by a judge from any pre-trial findings or recommendations of a referee except those dismissing a petition for lack of probable cause. The county attorney is not entitled to a review by a judge after jeopardy has attached.

(C) *Right of Parent(s) and Guardian.* The child's parent(s) and guardian are entitled to a review by a judge of a referee's findings or recommendations made after the allegations of a petition have been proved.

Subd. 4. The Court. The judge may grant a review at any time before confirming the findings and recommendations of the referee.

Subd. 5. Procedure. A review by a judge may be on the verbatim recording made pursuant to Rule 11 or may be de novo in whole or in part.

Rule 2.05. Order of the Court

The findings and recommendations of the referee become the order of the court when confirmed by the judge, subject to review pursuant to Rule 2.04.

STATEMENT OF THE CASE

Petitioner, Derrick Kabanuk, was charged with the offense of receiving stolen property, a criminal offense under

Minn. Stat. 609.53, Subd. 1(2) (1982). Since he was seventeen years old at the time of the alleged offense, the charge was prosecuted in a delinquency proceeding in the Juvenile Court.[1]

The matter was assigned by the Juvenile Court to a referee. A contested hearing on the charge was held before a referee of the Juvenile Court on October 26, 1983. At the conclusion of the hearing, the referee found that the charge was proven.

At this point it should be observed that Minn. Stat. 260.031, Subd. 2 provides that the judge of the juvenile court may direct that cases in the first instance may be heard by a referee in the manner provided for the hearing of cases by the

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[1]Minn. Stat. 260.015, Subd. 5 defines a delinquent child as one who has violated any state or local law.

court.[2] Subdivision 3 of this statute specifies that upon the conclusion of the hearing of a case, the referee shall transmit to the judge all papers relating to the case together with his findings and recommendations. Subdivision 4 of this statute provides that the minor and his parents are entitled to a hearing by the judge of the juvenile court if, within three days after receiving notice of the findings of the referee, they file a

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[2]Minn. Stat. 484.70, Subd. 6 provides that a party may object to the assignment of a referee. However, at the subsequent hearing on Petitioner's motion for a trial de novo, Petitioner testified that he was not advised by either the referee or by his court-appointed lawyer that he had the right to object to the assignment of a referee to hear his case; he also testified that he was not aware of this right. Nevertheless, the Court of Appeals held that he was "deemed" to have waived the right, because he was represented by counsel and failed to assert it. In re D.K., 363 N.W.2d 877, 880 (Minn. App. 1985).

request with the court for a hearing. Subdivision 5 of the statute provides that where no hearing before the judge is requested, or when the right to a hearing is waived, the findings and recommendations of the referee become the decree of the court when confirmed by an order of the judge.[3]

Following the hearing before the referee, Petitioner filed a request for a hearing before the judge of the juvenile court under Minn. Stat. 260.031, Subd. 4, contending that the statute afforded him a right to a trial de novo before the juvenile court judge. Petitioner also based his claim to a trial de novo upon constitutional grounds, arguing that the

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[3]The Minnesota Supreme Court has held that the findings of the referee are advisory only. The judge alone decides the case and renders the judgment. In re M.A.P., 281 N.W.2d 344 (Minn. 1979); In re Fields, 285 Minn. 184, 172 N.W.2d 322 (1969).

adjudication of his guilt or innocence by a judge who did not preside at the trial, and who did not see or hear the witnesses, would deny him due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The Juvenile Court denied Petitioner's motion for a trial de novo and proceeded to review the matter on the record of the hearing before the referee. On July 27, 1984, the Juvenile Court Judge issued an order affirming the finding of the referee and adjudging the Petitioner to be guilty of the offense of receiving stolen property.

Petitioner then appealed to the Minnesota Court of Appeals. On appeal Petitioner argued that he was entitled to a trial de novo under the statutory provision for a rehearing. Secondly, he argued that the adjudication of guilt by

a judge who did not preside at the trial violates the Due Process Clause of the Fourteenth Amendment.

The Court of Appeals affirmed. First addressing the statutory issue, the Court held that the statutory provision for a rehearing does not require a trial de novo, but may be satisified by a review of the record of the hearing before the referee. Turning to the constitutional issue, the Court of Appeals held that the statutory framework permitting the judge to decide the case by reviewing the record does not violate the right of the accused juvenile to due process of law.

Petitioner then sought review of the decision by the Minnesota Supreme Court. That Court denied review on May 20, 1985.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of constitutional law which should be decided by this Court.

In this case Petitioner asserts the right of the accused to have his trial conducted before the tribunal which must determine his guilt or innocence. It is a right which is fundamental. Indeed, it would seem that this right inheres in the very notion of a trial itself.

This Court has not previously held that an accused is entitled, as a matter of due process, to a trial conducted in the presence of the trier of fact. Nevertheless, the absence of a prior decision by this Court explicitly announcing this principle does not indicate that the right does not exist. On the contrary, it reflects the fact that the right has been widely assumed to exist and never seriously challenged.

It is, in fact, a deeply engrained principle of Anglo-American law, expressed by courts both implicitly and explicitly, that the accused is entitled to have his guilt or innocence determined by a tribunal which has personally heard the testimony and observed the witnesses.

More than one hundred years ago, Lord Coleridge stated the view of the Privy Counsel that a retrial should not be conducted by reading the notes of the witnesses' prior testimony:

> "The most careful note must often fail to convey the evidence fully in some of its most important elements.... It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration;... It is in short the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it." Regina v. Bertrand, 4 Moo.P.C.N.S. 460, 481, 16 Eng. Rep. 391, 399 (1867).

American courts have expressed the

same view. In United States ex rel. Graham v. Mancusi, 457 F.2d 463 (CA2 1972), the court applied the principle in federal habeas corpus proceedings to invalidate a procedure under which a state appellate court had entered a conviction of the defendant for a lesser offense when reversal of the original conviction was required because of improperly admitted evidence. Speaking for the court, Judge Friendly stated:

> "Due process forbids that, when an issue of fact is presented, a man should be sent to prison without the trier of facts having seen and heard his accusers and himself, if he desires to testify, and weighing their credibility in the light of their demeanor on the stand. We would thus reach no different conclusion in this case if Graham had not been constitutionally entitled to a jury trial. It would still be for the judge who saw and heard the witnesses at trial. . . to determine where the truth lay - not for appellate judges reading a cold record." Id. at 469-470.

This Court too has recognized the principle that, "[t]he one who decides

must hear." Morgan v. United States, 298 U.S. 468, 481 (1936).

In United States v. Raddatz, 447 U.S. 667 (1980), this Court considered the question of whether the Due Process Clause of the Fifth Amendment requires that the judge personally hear the testimony at a suppression hearing, or whether the judge is permitted to make the decision on the defendant's motion for suppression on the basis of his review of the record made before a magistrate. The Court held that it is constitutionally permissible for the judge to make his decision on the suppression motion based on the record, without personally hearing the testimony.

The majority opinion in United States v. Raddatz, however, provides no support for the notion that the decision on guilt or innocence could be made by one who had not personally heard the

testimony. On the contrary, the clear implication of Raddatz is that, unlike a suppression hearing, the trial itself must be conducted in the presence of the trier of fact. In fact, the Court in Raddatz resolved the due process issue precisely by distinguishing a motion hearing to suppress evidence from the criminal trial. As Mr. Chief Justice Burger stated for the Court:

> "This Court on other occasions has noted that the interests at stake in a suppression hearing are of a lesser magnitude than the criminal trial itself . . . We conclude that the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself." Raddatz, supra, 447 U.S. at 679.

The right of the accused to have his trial conducted before the trier of fact is fundamental because it is inherent in the very concept of a trial. This right is also fundamental in the sense that it implicates several other

constitutional rights of the accused, which would necessarily be vitiated or defeated if the right were denied. These include the standard of proof beyond a reasonable doubt, the right of confrontation, and the right of the accused to call witnesses and to testify in his own defense.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). But the rule requiring proof beyond a reasonable doubt is undermined when the determination of guilt is made upon a review of the written record of earlier testimony. How can the judge determine the guilt of the accused beyond a reasonable doubt when he has not had the opportunity to observe the witnesses or to evaluate their credibility in the light of their demeanor? As Mr. Justice Marshall remarked in his dis-

senting opinion in the case of Swisher v. Brady, 438 U.S. 204,231 (1977), "[t]rials-by-transcript can never be more than trials by substantial evidence."

The defendant's right of confrontation is guaranteed by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, (1965); Barber v. Page, 390 U.S. 719 (1968). The right of confrontation is applicable in juvenile delinquency prosecutions. In re Gault, 387 U.S. 1 (1967).

It has long been held that one of the primary purposes of the Confrontation Clause is to afford the defendant the opportunity to challenge his accusers in a direct encounter before the trier of fact. See California v. Green, 399 U.S. 156-158 (1970). At the heart of the constitutional guarantee is the right of the accused to compel the witness

"to stand face to face with the jury in order that they may look upon him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-243 (1895). But this essential purpose of the Confrontation Clause is wholly negated when the judge is permitted to decide the case by merely reviewing the cold transcript of testimony taken before a referee or magistrate. Such a procedure denies the defendant the constitutional right of confrontation.

The accused also has the right to testify in his own defense. In re Oliver, 333 U.S. 257, 275 (1948); Brooks v. Tennessee, 406 U.S. 605, 612 (1972); Faretta v. California, 422 U.S. 806, 819 (1975). But what does this right avail the accused if he cannot give his testimony face to face with the trier of fact?

The testimony of the accused is a truly critical phase of any trial in which the defendant chooses to testify. If the defendant testifies and is believed, he may assure his acquittal. Thus the factfinder must make a crucial assessment of the defendant's credibility. That assessment, of course, is based in large part upon the defendant's demeanor on the stand; the manner in which he answers the questions, his sincerity, his forthrightness or evasiveness. But the factfinder cannot adequately assess the defendant's truthfulness if he has not observed the defendant and heard his testimony. Reading the transcript of the defendant's testimony is clearly insufficient. That is why this Court stated in Holiday v. Johnston, 313 U.S. 342, 352 (1941):

> "We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner

> is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts."

Even aside from the need to assure a fair assessment of the defendant's truthfulness, a decent respect for human dignity mandates that a person charged with a criminal offense should be entitled to relate his version of the facts to the official entrusted with judging his guilt or innocence. "In this respect, the requirement that a finder of facts must hear the testimony offered by those whose liberty is at stake derives from deep-seated notions of fairness and human dignity." United States v. Raddatz, supra, at 697 (Marshall, J., dissenting).

The fundamental unfairness of a system allowing the judge to decide the case based upon the record of the earlier testimony before a referee is graphically demonstrated in the present case.

Petitioner was charged with the offense of receiving stolen property. Under the specification of the charge, the State had to prove that he possessed stolen property, and that he knew it was stolen.[4] At the hearing before the referee, Petitioner testified that he had not known the property was stolen. If his testimony was true, Petitioner was entitled to be acquitted. Having denied Petitioner's request for a trial de novo, the judge had to decide the case without personally hearing the testimony of the accused. Accordingly, the judge had no way of taking Petitioner's demeanor into

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[4]The delinquency petition alleged: "On July 18, 1983, at 1949 Oliver Avenue North, Brooklyn Center, Hennepin County, Minnesota, DERRICK GRANT KABANUK possessed stolen property, to-wit: one JMC boys moto-cross racing bicycle and one BXC boys moto-cross racing bicycle having a value of over $150.00, knowing said property to have been stolen, in violation of Minn. Stat. 609.53, Subd. 1(1)."

account in assessing the truth of Petitioner's testimony. Yet the judge found the Petitioner guilty beyond a reasonable doubt; and the judge's decision necessarily included a finding that Petitioner's testimony was not true. Under these circumstances, Petitioner quite clearly was denied due process of law.

2. The constitutional question presented by this case is important to the administration of juvenile justice.

Although the juvenile court system originated in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by antisocial conduct, recent decisions of this Court have recognized that there is a gap between the originally benign conception of the system and its realities. With

the exception of McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the Court's response to that perception has been to make applicable to juvenile delinquency trials the constitutional guarantees associated with traditional criminal prosecutions. In re Gault, 387 U.S. 1 (1967); In re Winship, 397 U.S. 358 (1970); Breed v. Jones, 421 U.S. 519 (1975).

The use of referees in the adjudicatory process of juvenile court proceedings was considered by this Court in the case of Swisher v. Brady, 438 U.S. 204 (1978). Swisher involved a Maryland procedure which authorized juvenile delinquency cases to be heard by masters, but permitted either party to file exceptions to the findings and recommendations of the master, and to obtain a hearing by the juvenile court judge. At issue in the case was whether the Double Jeopardy

Clause was violated by the procedure allowing the State to file exceptions to findings of the master which are favorable to the juvenile defendant. The Court held that the Double Jeopardy Clause was not violated by the Maryland procedure, because under such a procedure an accused juvenile is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge. This conclusion was based on the recognition that, under Maryland law, the master's findings are advisory only, and subject to acceptance, modification, or rejection by the juvenile court judge.

The holding in Swisher v. Brady was limited to the question of whether the Maryland procedure violated the Double Jeopardy Clause. As Mr. Chief Justice Burger noted, speaking for the Court:

> "It is not usual in a criminal proceeding for the evidence to be

> presented and recorded in the absence of the one authorized to determine guilt. But if there are any objections to such a system, they do not arise from the guarantees of the Double Jeopardy Clause." Id. at 216, n. 14.

While the majority in Swisher did not consider the due process issue arising under the Maryland procedure, the issue was addressed in the dissenting opinion. Mr. Justice Marshall, joined by Mr. Justice Brennan and Mr. Justice Powell, expressed the view that the procedure violated the due process principle that, where demeanor evidence is critical, the ultimate factfinder in a criminal case must hear the witnesses on whose testimoney his findings will be based. Swisher v. Brady, supra, at 229-232 (Marshall, J., dissenting).

Following the decision in Swisher v. Brady, the Arizona Supreme Court decided the case of In re Appeal in Pima County, 129 Ariz. 371, 631 P.2d 526

(1981). In that case the juvenile defendant appealed from an adjudication of delinquency by the juvenile court, which overruled a juvenile court referee's finding that the state had not proved delinquency beyond a reasonable doubt. The juvenile's claim was that the adjudication violated due process of law.

Noting this Court's decision in United States v. Raddatz, supra, that the Due Process Clause of the Fifth Amendment does not require a district court judge to hear the testimony personally at a suppression hearing in a criminal case, the Arizona Supreme Court concluded:

> "We believe the interests implicated in an evidentiary hearing to adjudicate the delinquency of a juvenile are deserving of more protection than those implicated in an evidentiary hearing on a motion to suppress an involuntary confession." Id. at 528.

Accordingly, the Court held that the

reversal by the juvenile court judge of the referee's finding that the charge was not proven violated the Due Process Clause, since the judge had not personally heard the disputed testimony.

The holding in In re Appeal in Pima County, supra, was limited to the situation where the judge rejects the findings of the referee. But the logic of the Arizona case is equally applicable to the situation where the judge agrees with the referee's findings. It is difficult to discern what logical distinction can be drawn between accepting the referee's findings and rejecting them, except that in the former case the judge is deferring to the referee. But in either case the judge is the only officer authorized to adjudicate the guilt of the accused. Cf. Swisher v. Brady, 438 U.S. 212, 216.

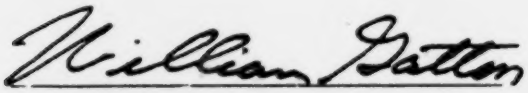
The present case puts before this Court the question whether the Due Process

Clause permits the guilt of an accused to be determined by a judge who has not personally heard the testimony. The issue is of great importance to the juvenile court system because it calls into question the validity of the adjudicatory process in those states which permit juvenile delinquency causes to be heard by referees or masters, while entrusting only the judges of the juvenile court with the power of adjudication. Since the issue was not decided by this Court in Swisher v. Brady, 438 U.S. 204, and since the dissenting justices in that case indicated that, in their view, such a procedure raises a serious question of the denial of due process of law, Petitioner urges that the question is appropriate for review by this Court.

CONCLUSION

For the reasons urged herein, it is respectfully requested that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Minnesota entered herein.

Respectfully submitted,



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APPENDIX

STATE OF MINNESOTA

IN COURT OF APPEALS

C8-84-1423

Hennepin County
Juvenile Court Division Lansing, Judge

In the Matter of the
Welfare of D.K.

William Gatton
Legal Rights Center, Inc.
808 E. Franklin Avenue
Minneapolis, Minnesota
55404

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Filed March 12, 1985
Wayne Tschimperle, Clerk
Minnesota Appellate Courts

S Y L L A B U S

1. Neither Minn. Stat. §260.031, subd. 4 (1982), nor constitutional guarantees of due process accord a juvenile the right to a trial de novo before a juvenile court judge after the case has been heard by a juvenile court referee.

2. Appellant waived his right to object to a hearing before a referee because he was represented by counsel and failed to assert his objection as required by Rule 2.02 of the Rules of Procedure for the Juvenile Courts.

Affirmed.

Heard, considered and decided by Lansing, Presiding Judge, Forsberg, Judge, and Leslie, Judge.

O P I N I O N

LANSING, Judge

Appellant, a juvenile, appeals from

the trial court's order adjudicating him delinquent on the charge of receiving stolen property. We affirm.

FACTS

Appellant D.K. was charged with receiving stolen property consisting of two children's racing bicycles, each valued in excess of $600, in violation of Minn. Stat. §609.53, subd. 1(2) (1982). A trial on the matter was held before a juvenile court referee, during which D.K. was represented by a public defender.

The referee found the petition had been proved beyond a reasonable doubt. D.K. then moved for a new trial before a judge of the juvenile court, contending that the fourteenth amendment of the United States Constitution and Minn. Stat. §260.031, subd. 4 (1982), afforded him the right to a trial de novo before a juvenile court judge. Section 260.031,

subd. 4, entitles a juvenile upon proper request to a hearing before a juvenile court judge after a matter has been heard by a referee.

A hearing was held on the motion, during which D.K. testified that neither the referee nor his court-appointed attorney had informed him that he had the right to have his trial before a judge of the juvenile court rather than a referee. He testified that he was not aware of this right.

The trial court denied D.K.'s request for a new trial and gave him ten days to file a motion for review of the referee's order on the verbatim record. D.K. then requested that the juvenile court judge review the referee's findings and recommendations. A hearing was held, and the trial court issued an order affirming the findings of the referee.

ISSUES

1. Does Minn. Stat. §260.031, subd. 4 (1982), or the due process clause of the fourteenth amendment of the United States Constitution mandate that a juvenile be allowed a trial de novo by a juvenile court judge after the case has been heard by a referee?

2. Did appellant waive his right to object to the assignment of a referee to hear his case?

3. Is the trial court's finding that appellant knew or had reason to know the property was stolen sufficient to support an adjudication of guilt as charged?

ANALYSIS

I

Minn. Stat. §260.031, subd. 4 (1982), provides as follows:

> The minor and his parents, guardians, or custodians are entitled to a hearing by the judge of the

> juvenile court if, within three days after receiving notice of the findings of the referee, they file a request with the court for a hearing. The court may allow such a hearing at any time.

At issue is the definition of the hearing as it is used in the statute. D.K. argues that "hearing" means a trial de novo. The State's position is that "hearing" has a braoder definition that does not necessarily include a trial de novo and that a trial de novo is discretionary with the juvenile court judge. The State's position is consistent with the past practice of the juvenile courts and with Rule 2.04 of the Minnesota Rules of Procedure for the Juvenile Courts (review by a judge of a proceeding heard before a referee "may be on the verbatim recording * * * or may be de novo in whole or in part"). Because rules of court may not abridge or modify substantive rights provided by statute, see Minn. Stat. §480.

059, subd. 1 (1982), this court may not rely solely on Rule 2.04 to determine the scope of the hearing provided by Minn. Stat. §260.031, subd. 4, but rather must determine the legislature's intent in drafting the statute.

The nature of the hearing intended under §260.031 is not expressly defined by the statute or by case law. The Interim Commission's comment to the provision, however, supports an interpretation consistent with Rule 2.04 and with the juvenile court's past practice. See Minn. Stat. Ann. §260.031, Interim Commission Comment, 1959 (West 1982). The comment says that the language of subdivision 4 is taken from the Hennepin County Juvenile Court Act, 1957 Minn. Laws ch. 742, §4, subd. 2, the review provisions of which did not mandate a de novo trial. The Act further provided that "the findings of the referee [are] prima facie evidence of the facts

contained therein," see id. ch. 742, §4, subd. 3, indicating that the hearing was primarily intended to be a review of the referee's findings, although the admission of further evidence was not foreclosed.

The Interim Commission's comment to Minn. Stat. §260.031 says, in addition, that the hearing is "not in the nature of an appeal, as it is in the Standard Act," referring to the Standard Juvenile Court Act prepared by the National Council on Crime and Delinquency. The Standard Act provides, in section 7, for a "hearing de novo" of a referee's findings and recommendations by a juvenile court judge upon request. Section 28 refers to a formal appellate court review of juvenile orders. The comment to the Minnesota statute thus indicates that the hearing contemplated under §260.031 is neither a de novo trial nor a formal

appeal.

This interpretation is consistent with the legislature's practice of expressly providing for a new trial when that is the legislative intent. See, e.g., Minn. Stat. §260.291, subd. 2(b) (1982) ("The appeal from a probate-juvenile court is taken to the district court which shall try the case de novo") (amended to reflect the creation of the Court of Appeals, 1983 Minn. Laws ch. 247, §111); id. § 487.30, subd. 1 ("rules * * * shall provide for a right of appeal from the decision of the conciliation court to the county court for a trial on the merits"); see also Stuart, Judicial Powers of Non-Judges: The Legitimacy of Referee Functions in Minnesota Courts, 6 Wm. Mitchell L. Rev. 65, 86 (1980) (the right to a "trial de novo" provided adult defendants convicted by non-lawyer judges is different from

the corresponding "rehearing before a judge" given juvenile defendants under Minn. Stat. §260.031, subd. 4).

D.K. argues that an adjudication of guilt by a judge who did not preside at the trial violates his due process rights under the United States Constitution. A juvenile court proceeding has not been held to be a criminal prosecution within the meaning of the sixth amendment, see McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971), and the applicable due process standard is "fundamental fairness," see id. at 543. The referee that heard D.K.'s juvenile proceeding was an attorney licensed under Minnesota law, and the proceeding was conducted in the same manner as it would have been before a judge. In addition, a juvenile has the right under Minn. Stat. §484.70, subd. 6 (1982), to object to the assignment of a referee to hear "a contested trial,

hearing, motion or petition." Because this framework adequately protects juveniles' due process rights, we need not expand the scope of the hearing provided under §260.031 beyond that intended by the legislature.

II

D.K. testified at trial that he was not informed of his right under Minn. Stat. §484.70, subd. 6, to object to the assignment of a referee to hear his case. He argues that this omission entitles him to a new trial because he could not have knowingly and intelligently waived a right of which he was not aware. Clearly it would have been preferable if the referee had advised D.K. of this important right, whether or not he was represented by counsel. However, despite its importance, the right is a statutory right, not comparable to the fundamental

constitutional rights for which courts have traditionally required a knowing and intelligent waiver on the record. See, e.g., Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (right to counsel); Carnley v. Cochran, 369 U.S. 506, 516 (1962) (right to counsel); McCarthy v. United States, 394 U.S. 459, 466 (1969), and Boykin v. Alabama, 395 U.S. 238, 243 (1969) (privilege against compulsory self-incrimination, right to trial by jury, right to confront accusers).

Minn. Stat. §484.70, subd. 6, does not require a knowing and intelligent waiver on the record, and the accompanying procedural rule indicates that the right to object to a hearing before a referee is waived if not affirmatively asserted in writing. See Minn. R.P. for the Juvenile Cts. 2.02. Because D.K. was represented by counsel and failed to assert this right, he must be deemed to

have waived it.

III

The mental state required to sustain a conviction for receiving stolen property under Minn. Stat. §609.53 (1982) is met if the person knew or had reason to know that the property was stolen. The petition charged D.K. with possessing stolen property "knowing said property to have been stolen, in violation of Minn. Stat. §609.53, subd. 1(1)." The memorandum attached to the trial court's order affirming the referee's findings said D.K. possessed property, "knowing or having reason to know that the property was stolen." Based on this difference in language, D.K. argues that he was not convicted of the crime with which he was charged, that he was improperly convicted on a finding that he committed the offense in a manner not

alleged in the pleading, and that he was not adequately informed of the nature and cause of the accusation against him.

The trial court's memorandum merely restated the court's conclusion, framed in the statutory language, that D.K. was guilty of the offense charged. The trial court specifically affirmed the referee's conclusion that the petition had been proved beyond a reasonable doubt.

D E C I S I O N

A juvenile is not entitled under Minn. Stat. §260.031, subd. 4, or under the due process clause of the United States Constitution, to a trial de novo after a proceeding before a referee. Although the referee should have informed the juvenile of the right to object to assignment of a referee, failure to do so does not entitle the juvenile to a new

trial.

Affirmed.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

JUVENILE COURT DIVISION

In the Matter of the Welfare of

DERRICK KABANUK

ORDER AND MEMORANDUM

D.C. #086100-96

The above-entitled matter came duly on for hearing before the Honorable Allen Oleisky, judge of the above-named Court, on the 23rd day of February, 1984 at 328 Court House, City of Minneapolis, County of Hennepin, State of Minnesota.

APPEARANCES WERE AS FOLLOWS:

Glen Boyce, Assistant Hennepin County Public Defender, appeared for and on behalf of the Petitioner, State of Minnesota.

Mr. William Gatton, Attorney at Law Legal Rights Center, appeared for and on behalf of the Respondent, Derrick Kabanuk.

The Court, being duly advised in the premises, hereby makes the following Order:

IT IS HEREBY ORDERED:

1. That Respondent's request for a new trial is hereby denied.

2. That Respondent shall have ten (10) days after receipt of this order to file a motion for review of the Referee's order on the verbatim record.

3. That provided Respondent does not motion the Court for a review on the verbatim record, counsel for the State shall contact the Court to set a disposition hearing.

4. That the attached memorandum shall be made a part of this Order.

BY THE COURT:

/s/
Allen Oleisky
Judge of District Court
Juvenile Court Division

Dated this 7th day of March, 1984.

MEMORAMDUM

The Respondent in the present case was charged with theft and tried before a Juvenile Court Referee. The Referee has recommended that the petition be found proven true. The issue before the Court is whether Respondent's demand for a new trial must be granted.

Rule 2.04 of the Juvenile Court Rules provides for review of a Referee's trial findings by a Judge. It states in relevant part "A review by a Judge may be on the verbatim record... or may be de novo in whole or in part." Rule 2.04 (5). (Emphasis added.) It is clear that trial de novo is discretionary rather than mandatory.

Respondent argues that Minnesota Statute §260.031 (4) provides for a trial de novo. It specifices only that, upon proper demand a minor is entitled to "a hearing" by the Judge of the Juvenile

Court. The scope or nature of a hearing allowed by Minnesota Statute §260.031 (4) is not, however, defined by statute or case law. The Interim Commission Comment to Minnesota Statute §260.031 (5) cited by Respondent is insufficient to convince the Court that a trial de novo, in this situation, is mandatory. The past practice of this Court shows that this statute has never been interpreted to entitle a juvenile, as a matter of right, to a trial de novo.

Respondent also urges the Court to grant a trial de novo because, as Respondent claims, he was never advised of his right to object to the trial being heard by a Referee. The Court is unable to determine by the record if Respondent was in fact, ever so advised. However, Respondent was represented by counsel and the Court must assume that Respondent's attorney was fully aware that this right

existed, and that this right was knowingly and intelligently waived.

Finally, Respondent argues that an adjudication of guilt by a Judge who has not presided at the trial violates due process of law. In all trials heard by Referees, each Respondent is entitled to all Constitutional protections, that he or she would have before a judge. A trial before a Referee is conducted in precisely the same manner as would be the case before a Judge. The procedure for hearings before a Referee and confirmation by a Judge set forth in Minnesota Statute §260.031 and Rule 2 of the Juvenile Court Rules is consistent with due process requirements.

For the reasons set forth above, Respondent's request for a trial de novo is hereby denied.

A.O.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

JUVENILE COURT DIVISION

In the Matter of the Welfare of

DERRICK KABANUK

ORDER

D.C. #081600-96

The above-entitled matter came duly on for hearing before the undersigned, one of the Judges of the above-named Court, on May 21, 1984, at 328 Court House, Minneapolis, Minnesota.

APPEARANCES WERE AS FOLLOWS:

William Gatton, Attorney at Law, appeared for and on behalf of the respondent-child.

Glen Boyce, Assistant Hennepin County Attorney, appeared for and on behalf of

Hennepin County.

Upon all the files, records, proceedings, together with argument of counsel made in Court, and legal memoranda, the Court makes its Order as follows:

IT IS HEREBY ORDERED:

1. That Referee Haeg's Order of October 26, 1983 finding the Respondent guilty of receiving stolen property is hereby affirmed.

2. That the attached memorandum shall be made a part of this Order.

3. That the matter is scheduled for a Disposition Hearing before Referee Thomas Haeg on August 16, 1984 at 4:00 p.m.

BY THE COURT:

/s/
Allen Oleisky
Judge of District Court
Juvenile Court Division

Dated this 27th day of July, 1984.

MEMORANDUM

Respondent appeals from the Referee's Order of May 21, 1984 on three grounds. Respondent argues that the element of knowledge has not been proven beyond a reasonable doubt; that the element of possession of the stolen BXC bicycle was not proven beyond a reasonable doubt; and, the Respondent was denied the effective assistance of counsel at the hearing before the referee.

On August 3, 1983, Respondent was charged with Possession of Stolen Property knowing said property to have been stolen in violation of Minnesota Statute Section 609.53 subd. 1(1) (1982). This section reads as follows: "Any person who receives, possesses, transfers, buys or conceals any stolen property or property obtained by robbery, knowing or having reason to know the property was stolen or obtained by robbery, may be sentenced

as follows...."

To convict a person for receiving or concealing stolen property the state must prove that the respondent received or concealed the property specified in the complaint, that the property had been stolen, and the respondent knew or had reason to know that the property was stolen and nevertheless, intentionally received or concealed it. See Minn. Stat. §609.53 Subd. 1(1) (1982); see also State v. Melina, 297 Minn. 342, 345, 210 N.W. 2d 855, _____(1973) (per curiam) (decided prior to 1982 amendent which altered language from statute from "knowing" the property had been stolen to "knowing or having reason to know" the property was stolen).

In the present case, the state proved beyond a reasonable doubt that the property involved, a JMC and a BXC bicycle belonging to David Ralph's children, had

been stolen. The state also proved that the respondent received or had possession of the JMC bicycle belonging to Mr. Ralph's daughter, as this was the bike respondent was trying to sell to DeWayne Stein.

The state produced the following evidence to prove that the respondent also possessed the BXC bicycle. First, both bicycles were stolen at the same time. Second, Mr. Ralph testified that the pedals on the JMC bicycle, when it was recovered, were those he had altered and placed on the BXC bicycle prior to its having been stolen. Next, the state demonstrated that the handle bars on the bike that respondent was riding when he came to sell the JMC bike were the ones that Mr. Ralph had altered for use on his son's BXC bike and were the handle bars that had been on that bike when it had been stolen. Mr. Ralph had testified

that these handle bars were very uncommon and that he had had to place a special order to get them.

The respondent testified that he received the handle bars from Chuck Zeck and he produced a receipt to corroborate his testimony. Respondent further testified that he bought the JMC in the same condition it was in when he tried to sell it and he did not buy the handle bars from the same person he bought the bike from.

The evidence regarding the possession of the BXC is insufficient to support a finding that the respondent ever possessed the bike. The fact that the respondent had two parts of the bike in his possession at the time of his arrest, does not, prove beyond a reasonable doubt that the respondent possessed the BXC in its entirety.

The final element that the state must

prove is that the respondent knew or had reason to know that the property was stolen and despite that knowledge intentionally received it. The respondent stated that he purchased the JMC from a friend of a friend, but he would not reveal the friend's identity. In direct examination the respondent stated "He told me that he had a friend who knew where he could buy a bike real cheap. He told me the price and what kind of bike it was and everything and --." Trial transcript at 60, lines 12-15. Later, on cross-examination, the respondent stated that he paid $125.00 for the JMC. See Trial Transcript at 73, lines 7-14. Yet, the respondent knew the bike had a value of at least $200 to $250 as that is what he was willing to sell it for. The state demonstrated through two witnesses that the bike had a value of $650 to $700. Given the disparity in

the bike's actual value what the Respondent paid for it, and what the Respondent was willing to sell it for, it is apparent that he had reason to know that the bike was stolen.

The fact that the respondent parked his car away from Mr. Stein's house because "I didn't want anybody to trace it back to my house in case they didn't buy the bike, and they'd know where the bike was by identifying our car or license plate, so I didn't want them to know where we were from.", Trial Transcript at 70, lines 6-10, also indicates the respondent knew the bike was stolen or had reason to know that it was.

Respondent is guilty of possession of stolen property, with a value in excess of $300 knowing or having reason to know that the property was stolen. See State v. Simpson, 298 Minn. 235, 214 N.W.2d 679 (1974) (jury could properly

infer requisite knowledge and wrongful intent from evidence that defendant bought property shortly after it was stolen for price far below its actual value); State v. Louis, 285 Minn. 276, 172 N.W.2d 754 (1969) (defendant's lack of satisfactory explanation for his possession of stolen property is evidence he knew it was stolen). All the circumstances proved by the state are consistent with a finding of guilty and are inconsistent with any rational hypothesis except respondent's guilt.

Respondent's final claim is that he was denied the effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and is therefore entitled to reversal. The United States Supreme Court has stated that a defendant making such a claim must identify the acts or omissions of counsel that are alleged not to have

been the result of reasonable professional judgment. Strickland v. Washington, 35 U.S.L.W. 3066, 3072 (U.S. May 14, 1984). Further, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 3073.

> The Eighth Circuit Court of Appeals has stated:
>
> a defendant is not entitled to representation that results in an acquittal, nor is he entitled to the "best possible" representation. Neither is a defendant entitled, at the instance of new or substituted appellate counsel, to have this court review by hindsight tactical decisions made by trial counsel in the course of the trial.

United States v. Rhoads, 617 F.2d 1313, 1319 (8th Cir. 1980).

Respondent claims that court-appointed defense counsel failed to properly investigate the case and develop relevant and material exculpatory evidence. To support his argument, respondent states that defense counsel should have called Chuck Zeck as a witness to corroborate respondent's testimony about the purchase of the handle bars. Respondent states that defense counsel should have called a witness from B.J.'s bike shop to testify as to how common the handle bars are.

Such testimony would relate only to the possession of the BXC and not the JMC. Since respondent was not found guilty of possession of the stolen BXC, the failure to produce such evidence did not prejudice the respondent's case.

Respondent next argues that court-appointed defense counsel could have and should have introduced evidence that

Mr. Ralph originally purchased the JMC complete from B.J.'s bike shop for $365.00. Such evidence, while it may have been helpful, would not eliminate the fact that respondent purchased the bike shortly after it had been stolen for far less than its actual value at that time.

Next, respondent argues that court-appointed counsel failed to "properly" examine respondent while he was on the witness stand. Defense counsel did try to elicit from the respondent who he purchased the bike from, however respondent refused to answer with anything other than "a friend of a friend." See Trial Transcript at 60, lines 10-19. Respondent cannot now claim that he would have disclosed the name of his friend at trial had his attorney asked more questions. Respondent's failure to disclose information requested by his attorney cannot later

be held to be grounds for reversal.

Respondent finally argues that court-appointed counsel should have made a different closing argument. Closing arguments, like much of the conduct of a trial, is based on strategy. When a case is tried before a court without a jury, it is not uncommon for counsel to waive closing arguments.

The statement by trial counsel that "I hold, Your Honor, the evidence is sufficient to find him not guilty of this matter." Trial Transcript at 77, lines 9-10, is an incorrect statement of the law as it apparently shifts the burden from the prosecution to the defense. In front of a jury, such a comment may be reversible error. However, this case was tried before a referee; no jury was present. The Court, being learned in the law, is well acquainted with the fact that the state has the burden of proof

in this case. Such comment, though not reasonable, did not prejudice the respondent in any way.

The respondent has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel acted differently. Therefore, respondent's conviction cannot be reversed on the claim that he was denied effective assistance of counsel.

A.O.

STATE OF MINNESOTA

SUPREME COURT

x COURT OF APPEALS

In the Matter of the Welfare of D.K.

JUDGEMENT

C8-84-1423
Appellate Court Case Number

081600-96
Trial Court Case Number

Pursuant to the order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to wit, of the District Court within and for the County of Hennepin be and the same hereby is affirmed and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT

June 3, 1985
Dated

Attest: Wayne Tschimperle
Clerk of the Appellate Courts

By: /s/ Maria Votel
Deputy/Assistant Clerk

OFFICE OF
APPELLATE COURTS
FILED

MAY 20, 1985

WAYNE TSCHIMPERLE
CLERK

STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1423

In the Matter of the Welfare of D.K.

O R D E R

Based upon all the files, records and proceedings, herein,

IT IS HEREBY ORDERED that the petition of D.K. for further review be, and the same is, denied.

Dated: May 18, 1985.

BY THE COURT:

/s/Douglas K. Amdahl
Chief Justice